Nos. 879, 909 AND 936.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

SOUTHERN PACIFIC COMPANY, *Petitioner,*

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*

WALTER E. MEYER, *Petitioner,*

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *Petitioner,*

v.

BERRYMAN HENWOOD, as Trustee of St. Louis Southwestern Railway Company Lines, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN OPPOSITION

OF

THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK AND MISSISSIPPI VALLEY TRUST COMPANY.

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Opinions Below.

The Report and Order of the Interstate Commerce Commission (herein called "Commission") of June 30, 1941 (R. 3495-3735) are reported in 249 I. C. C. 5, and its Supplemental Report and Order of March 9, 1942 (R. 3736-3820) are reported in 252 I. C. C. 325. The opinion of the District Court (R. 5183-5213) is reported in 53 F. Supp. 914. The opinion of the Circuit Court of Appeals (R. 5559-5683) is reported in 157 F. (2d) 337.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered August 26, 1946 (R. 5681-5683). Petitions for rehearing were denied October 22, 1946 (R. 5831). The petitions for writs of certiorari were filed, respectively, January 13, 1947 (No. 879), January 18, 1947 (No. 909), and January 21, 1947 (No. 936). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Principal Questions Presented.

(1) Whether the Circuit Court of Appeals erred in refusing to remand the proceedings to the Commission because of the Debtor's substantial earnings subsequent to the Commission's formulation of the Plan, as a result of which, it is alleged, the Debtor is no longer "insolvent"? (Nos. 879, 909, and 936.)

(2) Whether the Circuit Court of Appeals erred in refusing to remand the proceedings to the Commission because of events transpiring subsequent to the formulation of the

Plan, as a result of which, it is alleged, Debtor's earning power is now substantially greater than it was at the time the Commission formulated the Plan? (Nos. 879, 909, and 936.)

(3) Whether the Circuit Court of Appeals erred in holding that there was substantial evidence to sustain the Commission's findings, affirmed by the District Court,—

(a) that the Debtor's earnings were not impaired by reason of the breach of fiduciary or other obligations, or by violations of the anti-trust laws, on the part of Southern Pacific Company and others, and

(b) that the Southern Pacific Company has not been guilty of "wrongful, illegal and unconscionable" acts in respect of the Debtor? (No. 909.)

(4) Whether the Circuit Court of Appeals correctly held that the procedure followed by District Judge Moore upon the death of Judge Davis did not constitute an abuse of discretion? (No. 909.)

(5) Whether the Circuit Court of Appeals abused its discretion in denying the motion of Petitioner Meyer to remand the case to the Commission on the ground of alleged newly-discovered evidence? (No. 909.)

Statutes Involved.

These cases arise under Section 77 of the Bankruptcy Act, as amended (11 U. S. C. A. 205). Pertinent provisions of Section 77, particularly subdivision (c) thereof, are quoted in appendices to the Petitions.

Statement.

The Debtor filed its petition for reorganization under Section 77 of the Bankruptcy Act on December 12, 1935 (R. 24-27), and thereafter similar petitions were filed by its three subsidiaries (R. 57-76). Objections to Debtor's petition by Walter E. Meyer and others (R. 83-87) were overruled by the District Court (R. 87-91). On January 3, 1936, a Trustee was appointed (R. 93-96).

On December 7, 1936, Debtor filed a proposed plan of reorganization; and thereafter other plans were filed (R. 3515-3546). Hearings on all these plans were begun before the Commission on March 16, 1937, and concluded on April 24, 1937 (R. 96-216). A substantial portion of the testimony related to various charges against Southern Pacific Company by Walter E. Meyer (R. 168-212).

In April, 1937, Walter E. Meyer filed with the Commission a voluminous petition for an investigation of his said charges (R. 339-351), which was followed on June 19, 1937, by an amended and supplemental petition for investigation and for reopening the proceedings (R. 357-467). These petitions were denied by the Commission on July 12, 1937 (R. 479-480).

On February 7, 1938, Examiner Walsh of the Commission issued a Proposed Report containing a plan which varied from the plans theretofore submitted (R. 255-339),[1] in which he rejected Mr. Meyer's contentions (R. 306-314).

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[1] The Examiner proposed a capitalization variable in amount depending on whether the claims of the holders of the Debtor's First Terminal and Unifying Bonds were held to be payable in guilders. These claims were ultimately held by the Supreme Court not to be payable in guilders. *Guaranty Trust Co.* v. *Henwood*, 307 U. S. 247 (1939).

Exceptions to this Proposed Report were argued orally before the Commission on May 16, 1938.

On January 10, 1939, in response to a further petition filed by Walter E. Meyer in April, 1938 (R. 480) and a memorandum filed by him in November, 1938 (R. 480-500), the Commission reopened the proceedings for the purpose of receiving further evidence relating to charges made by Meyer with respect to the effect upon the Debtor's earnings and assets of control by Southern Pacific (R. 500-501). Thereafter, hearings were held *for this sole purpose* from May 5, 1939, to May 27, 1939, and from September 18, 1939, to September 30, 1939 (R. 529). At these hearings a vast amount of evidence, including hundreds of exhibits, was introduced (R. 529-2680, 2681-3055).

On June 30, 1941, the Commission issued its initial Report and Order setting forth its Plan for the Debtor (R. 3495-3735; 249 I. C. C. 5). In said Report, of which 131 pages are devoted to an elaborate consideration of the Meyer charges (R. 3547-3678), the Commission, so far as the present petitions are concerned, found and determined—upon "a consideration of the entire record, including the elements of value referred to, the earnings and prospective earnings" (R. 3700)—

> (1) that the "fixed-interest charges immediately following reorganization should be about $1,500,000 a year" (R. 3691); that "the new capitalization should not exceed approximately $75,000,000, of which not more than one-half should be in the form of debt, nor more than one-fourth in the form of preferred stock, and the remainder in common stock" (R. 3692); that "debt claims totaling $8,304,118 can receive no recognition within the limits of capitalization approved" (R. 3700); that "the equities of the holders of the stock of the debtor have no value"

(R. 3700); and that therefore the stockholders could recieve no recognition in the reorganization; and

(2) that the charges of Walter E. Meyer against Southern Pacific were entirely without foundation (R. 3547-3678).

Thereafter petitions for modification of the Plan were filed. On March 9, 1942, the Commission issued its Supplemental Report and Order, which modified its original plan in certain relatively minor respects but which reaffirmed the same so far as the present petitions are concerned (R. 3736-3820; 252 I. C. C. 325). On March 23, 1942, the modified plan was certified to the District Court (R. 3494-3495).

From October 26, 1942, to November 5, 1942, hearings were held before the late Judge Davis upon objections to the Plan, at which additional evidence, including data as to recent earnings, was presented (R. 4051-5136). The great bulk of such additional evidence related to the charges made by Walter E. Meyer against Southern Pacific (R. 4157-4199, 4202-4209, 4304-5136). The parties stipulated that the entire record before the Commission and "every record that has been made in this case from its inception" should be deemed in evidence before the District Court (R. 4057).

Prior to the filing of briefs in support of the Plan and objections thereto, Judge Davis died. The case was then referred to Judge Moore (R. 5138), who, after a conference with counsel, including Mr. Meyer, on April 23, 1943, entered an order directing a reargument on May 31, 1943, upon the case as submitted before Judge Davis, with all parties having the right to apply for leave to present additional testimony (R. 5181-5183).

In the meantime, on March 15, 1943, the Supreme Court handed down its opinions in the *Western Pacific* (318 U. S. 448) and *Milwaukee* (318 U. S. 523) cases. Thereafter the

principal contentions now made by Petitioners were argued orally and on written briefs before Judge Moore. At this hearing *neither Mr. Meyer nor any other party sought leave to present additional evidence.* On February 8, 1944, the District Court filed an opinion and entered an order in which it approved the Plan (R. 5183-5212; *In re St. Louis Southwestern Ry. Co.,* 53 F. Supp. 914).

Upon appeals from said order by Petitioners and others (which were argued in April, 1945), all the principal contentions now made by Petitioners were, in essence, argued orally and on written briefs. On August 26, 1946, the Circuit Court of Appeals (which apparently held up its opinion until the coming down of the decision of this Court in the *Denver* case) affirmed the order of the District Court except in a minor respect not here relevant (R. 5559-5683; *St. Louis Southwestern Ry. Co.* v. *Henwood,* 157 F. (2d) 337). Thereafter petitions for rehearing were denied (R. 5831).

ARGUMENT.

PART I.

The contention that the Plan has become unfair because of changed conditions.

1. To the extent to which it has not already been foreclosed by the decisions of the courts below, Petitioners' contention is one which should be, and can be, presented in the first instance to the District Court; and there will still be opportunity for final review by this Court.

Petitioners' complaints stem from the Commission's finding (R. 3692, 3700), affirmed by both courts below (R. 5211-5212, 5653-5671), that the value of the Debtor's properties for purposes of the plan is $75,000,000. Because this

sum did not provide sufficient capitalization to take care of all creditor claims, the Commission found that the equity of the stockholders was without value (R. 3700), and both courts below have affirmed this finding (R. 5211-5212, 5653-5671).

Petitioners do not assert that the decision of the Commission was erroneous when made, *i.e.*, on the basis of the evidence then before the Commission.[2] They do not even assert that the decision of the District Court, affirming the finding of the Commission, was erroneous when made. Their basic contention here is that since the decisions of the Commission and the District Court—

> (1) the assets of the Debtor have increased so substantially, as the result of large earnings, that the Debtor is now "solvent," and
>
> (2) the earning power of the Debtor has increased so substantially as to bring about a fundamental change in the basic factor on which the Commission predicated its finding of value,

so that the Plan may no longer be regarded as "fair and equitable".

Respondents question whether there exists any "changed conditions" which clearly were not in contemplation of the Commission. But whether or not there has been such a change is not an issue which this Court should be asked to decide on the basis of conflicting and unverified assertions made in briefs—at least at this stage in the

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[2] The Debtor expressly disclaims any challenge of the Commission's findings (No. 936, p. 25).

The Petitioner Meyer, of course, challenges the Commission's findings to the extent that it did not accept the charges made by him against Southern Pacific and others.

proceedings. This is an issue of fact which (to the extent to which it has not been foreclosed by the decisions of the two courts below)[3] should be presented to the District Court, which can receive evidence *pro* and *con; and there will be at least two opportunities for Petitioners to raise this issue in the District Court before the Plan can be confirmed.*

In the case at bar, unlike the *Denver* case decided by this Court in June, 1946, and again in February, 1947, the Plan has not yet been submitted to the creditors for a vote. Under Section 77(e), the next step in the instant case (if the petitions for certiorari be denied and if the District Court does not direct different action) is for the Commission to submit the Plan to the creditors for a vote thereon. When such vote has been taken, the Plan must come again before the District Court to be confirmed; and at that time (as made clear by this Court in the *Denver* case) Petitioners can raise the contentions which they are here making. At that time (if any class of creditors have rejected the Plan) Petitioners will be in a position to support such contentions by evidence; and parties wishing to oppose the same will be able to offer contrary evidence.

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[3] In *Insurance Group Committee, et al.* v. *The Denver and Rio Grande Western Railroad Company, et al.*, No. 690, October Term, 1946, decided February 3, 1947, this Court said:

> "* * * we ruled in our decision of June 10, 1946, * * * that in this reorganization no changed circumstances, up to that date, presented to us by the debtor or other respondents in that review justified a re-examination of the plan as confirmed. This ruling was binding upon the District Court and the Circuit Court of Appeals as to changed circumstances arising after the order of confirmation and prior to our decision. When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. * * *"

Even before the Plan is submitted for a vote, the District Court will be in a position (after the disposition of the pending petitions for certiorari) to remand the Plan to the Commission *not for submission to the creditors, but for a re-examination of the question of the fairness of the Plan in the light of changed conditions.* As a matter of fact, a petition to this end is now pending in the District Court and will undoubtedly be brought on for hearing as soon as the District Court has recovered jurisdiction over the Plan.[4]

When the Commission approved the Plan, it necessarily undertook to forecast the Debtor's *future* earnings. As stated in *Insurance Group Committee, et al.* v. *The Denver and Rio Grande Western Railroad Company, et al.*, No. 690, October Term, 1946, decided February 3, 1947, earnings estimates by the Commission "are made with allowance for changing economic conditions." If the Commission's forecast was made on sound principles (and Petitioners do not here assert the contrary), it must be accepted as valid, under the *Western Pacific* and *Milwaukee* decisions, unless and until it can be demonstrated that there has been a change of conditions which clearly was not envisaged by the Commission. As late as October, 1946, when the petitions for rehearing were denied, the Circuit Court of Appeals held that there had been no such change. Conceivably, notwithstanding the finding, it may be shown that, in the light of changes since October, 1946, there have been material changes not contemplated by the Commission; but, at this stage of the proceedings, the place for such a showing is the District Court.

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[4] Late in December, 1946, one Carl Rosenberger, owner of certain bonds and stocks of the Debtor, filed a motion in the District Court asking that the Plan be remanded to the Commission because of "changed conditions." The hearing on said motion has been set for March 28, 1947.

When, many months hence, the Plan comes before the District Court for confirmation, Petitioners will be able to raise the point of "changed conditions". If their contentions are rejected they may appeal to the Circuit Court of Appeals; and if unsuccessful there, they will still have recourse to the Court upon certiorari.

If, in the case at bar, this Court should now undertake to decide whether there have been "unanticipated, large earnings" during the period between the Commission's formulation of the Plan and the time of this Court's decision, and should decide that there had been none, grave injustice might be done, and no real progress would have been made toward the consummation of a Plan. This Court's decision would have covered *only a part* of the period with respect to which an objector to the Plan could introduce evidence (as to changed conditions) when the Plan comes before the District Court for confirmation; the position of the objectors to the Plan would be weakened to a substantial but indeterminate extent; and those who supported the Plan would still have no assurance that the Plan would eventually be confirmed.

2. The applicable principles have been fully stated by this Court in recent decisions.

In every Section 77 proceeding in which the plan was formulated by the Commission prior to, or during the early stages of, the recent war, contentions have been advanced which are, in all substantial respects, identical with those here asserted, *i.e.*, that the plan has become inapplicable because of "changed conditions" resulting from "unanticipated, large earnings." Three such cases have been reviewed by this Court, one quite recently. In each such case this Court, while recognizing the power of a District Court to remand the plan to the Commission because of changed

conditions (and also the power of an appellate court under certain circumstances to remand the plan to the Commission for the same reason), has held that the objectors had failed to sustain the burden of showing that there had been a change of conditions which could not fairly be said to have been in the contemplation of the Commission when the plan was formulated.

In *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943), the Court said (pp. 507, 508, 509):

> "• • • Respondents ask us to take into consideration the changed conditions since the Commission acted. • • •
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> "In the interest of advancing the solution of as many problems in reorganization as possible, we have deliberated upon the effect to be given these unexpectedly large earnings. There are factors in these increased incomes which obviously affect their weight as evidence of continued capacity to produce earnings available for dividends. • • •
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> "• • • The Commission's forecast was made with knowledge and not in disregard of past fluctuations of income, in war and in peace. On the showing as to changed conditions made before the District Court, there was no basis for a disapproval of the Commission plan as unfair to the junior equities. The further evidence of increased earnings, placed in the record by the stipulations, does not lead us to reject the Commission's plan."

Dealing with the same issue, this Court, in *Group of Investors* v. *Milwaukee R. Co.*, 318 U. S. 523 (1943), said (pp. 542, 543, 544):

> "The question of the increase in earnings since the Commission approved the plan raises of course different issues. As we have indicated in the *Western*

Pacific case, the power of the District Court to receive additional evidence may aid it in determining whether changed circumstances require that the plan be referred back to the Commission for reconsideration. * * *

"We agree with the Circuit Court of Appeals that no sufficient showing of changed circumstances has been made which requires the District Court to return the plan to the Commission for reconsideration. * * * In view of these considerations, we cannot say that the junior interests have carried the burden which they properly have of showing that subsequent events make necessary a rejection of the Commission's plan."

Still later, in *Reconstruction Finance Corp.* v. *Denver & R. G. W. R. Co.*, decided June 10, 1946, this Court said (66 S. Ct. 1282, 1291, 1296):

"* * * Changes in economic conditions cannot affect the powers of the reorganization agencies even though such changes may require a reexamination into the present fairness of the former exercise of those powers.

* * * * * *

"* * * Assuming that the courts, as courts with equity powers in a bankruptcy matter, might set aside a plan, fair and equitable when adopted by the Commission, merely on account of subsequent changes in economic conditions of the region or the nation, it should not be done when the changes are of the kind that were envisaged and considered by the Commission in its deliberations upon or explanation of the plan."

The matter was even more recently before this Court in *Insurance Group Committee, et al.* v. *The Denver and*

Rio Grande Western Railroad Company, et al., No. 690, October Term, 1946, decided February 3, 1947. In that case the Court assumed, arguendo, "that both this Court upon appeal from an order of confirmation in bankruptcy, and the bankruptcy court itself, after its order of confirmation has been affirmed on review (11 U.S.C. § 205(f)), may take cognizance of subsequent changes in conditions and order a plan re-examined by the Interstate Commerce Commission"; and then, after outlining facts alleged to show "changed conditions" of substantially the same general character as those alleged in the case at bar, held "that the debtor has failed to allege the existence of changed conditions since our decision of June 10, 1946, of a kind not 'envisaged and considered by the Commission in its deliberations upon or explanations of the plan.'" The Court further stated:

> "Much of what we have written is directed at the suggestion that there should be a plenary re-examination of reorganization proposals for the Denver & Rio Grande. As to that suggestion, we are of the opinion that the record affirmatively shows a proper basis for the valuation and allocation of securities by the Commission, * * * and that the record fails to show any sound basis for a re-examination on account of changed circumstances between May, 1941, and June 10, 1946.
>
> "So far as the period since June 10, 1946, is concerned, there is no basis in this record or in anything judicially known to us for a conclusion that there has been a significant change in interest rates, earnings available for interest or traffic. Nor do we see that the action of Congress in passing S. 1253, on July 31, 1946, should persuade us to require a stay to await further enactments that might affect this reorganiza-

> tion. It was vetoed. * * * We must continue to act under the now existing law.* * *"

The Circuit Court of Appeals in the case at bar had all except the last of these decisions before it when it reached its decision. In fact, there is reason to believe that the Court held up its decision for several months awaiting the June 10, 1946, decision in the *Denver* case. The only issue thus presented is whether, on the particular facts of this case, the court below correctly applied the applicable principles so recently and fully stated by this Court. We respectfully submit that this does not raise an issue which should be reviewed by this Court.

3. Petitioners have misconceived the basis upon which the relief they seek should be predicated.

Petitioners have consumed much space in endeavoring to show that, because of decrease in indebtedness and increase in current assets, the Debtor is now "solvent". The present proceedings, however, were not instituted because Debtor was "insolvent", but because it was "unable to meet its debts as they matured" (R. 26). This latter allegation alone was all that was necessary to give the District Court jurisdiction (11 U. S. C. A., §205 (a)). Plainly, therefore, in determining whether the stockholders have been improperly excluded from the Plan, the test is not whether the Debtor is "insolvent", but whether the stockholders' equity possesses a real value; and the answer to this question, in an appellate court, must always be in the negative unless the stockholders can demonstrate affirmatively that the Plan not only fully satisfies the admittedly prior claims of the creditors, but *actually overpays the creditors.*

Thus, in *Insurance Group Committee, et al.* v. *The Denver and Rio Grande Western Railroad Company, et al.*, No. 690, October Term, 1946, decided February 3, 1947, this Court said:

> "The Commission made no finding that the cash value of the securities allocated to the senior creditors paid them in full. To justify the change of position of creditors from fully secured to partially secured, creditors were given opportunities to participate in profits through common stock ownership with a chance at larger earnings than the Commission's forecast anticipated. * * * The debtor has made no allegation, either in this effort for re-examination or before, that the existing cash value of the securities allotted any creditor has ever aggregated the amount of the creditor's claim against the debtor. We think the absence of such an allegation, of itself, demonstrates that the plan is not, because of excessive interest, unfair to the debtor or those for whom it is allowed to appear.
>
> "Until it can be contended with some show of reasonableness that the creditors senior to the creditors and stockholders whom the debtor represents here have received more in value than the face of their claims, *the debtor's insistence on a re-examination of the plan is without substantial support.* * * *" (Italics supplied.)

In the case at bar Petitioners have not even alleged, let alone undertaken to show, that the creditors whose claims are treated in the Plan have been, in effect, overpaid. In this connection, it may be pointed out that in spite of Debtor's admittedly high earnings, its First Terminal and Unifying Bonds (having a total claim for principal and interest of over 102) are now selling on the New York Stock

Exchange at about 80, and its General and Refunding Bonds (having a total claim of approximately 122) are selling at about 88.

4. The validity of Petitioners' basic assumption has not been established.

Underlying Petitioners' contentions is the assumption that since the Commission formulated the Plan, Debtor's assets have increased to a point where it is now "solvent." Without undertaking to discuss the question whether Debtor is or is not now "solvent", we point out that Petitioners' assumption is predicated upon a misapprehension of the bases on which the Commission arrived at a total valuation of $75,000,000.

Thus, Southern Pacific argues: When the Commission fixed a valuation of $75,000,000, there was a "deficit" of $8,304,118, *i.e.*, the debt claims exceeded $75,000,000 by only $8,304,118;[5] comparing Debtor's August 31, 1941, balance sheet (which, Southern Pacific asserts, "may be regarded as forming the basis for the Commission's values in its Supplemental Report") with its balance sheet for October 31, 1946, there has been an increase in current assets and a decrease in debt aggregating $27,119,075, so that Debtor is now "solvent" by a margin of $18,800,000, or, if the debt is computed on the basis of the pledged bonds held by certain noteholders rather than on the basis of the notes held by such noteholders (as, of course, it must be, since under the Plan the noteholders are treated as if they were the outright owners of the pledged bonds held by them),

[5] If the debt claims were computed on the basis of the pledged Bonds held by three noteholders (who, under the Plan, are treated as the outright owners of the pledged Bonds), the "deficiency" would have been over $20,000,000.

Debtor is now "solvent" by a margin of $6,800,000 (No. 879, pp. 8, 28, 29).

A basic flaw in this argument is the assumption that the Commission's valuation of $75,000,000 *did not take into account future prospects of large earnings which, as the District Court put it* (R. 5208), *was "apparent from the circumstances prevailing."* This assumption is plainly ill-founded.

In its initial Report, the Commission stated that it fixed the new capitalization of $75,000,000 on the basis of "all the data of record on property valuation and past and *prospective* earnings" (R. 3692). In its Supplemental Report it pointed out that it had considered "all the data of record" including "traffic and earnings to the latest available date" and "also *future prospects* of traffic and earnings"; and that it arrived at the sum of $75,000,000 upon "a consideration of the earning power of the property, past, present and *prospective,* and all other relevant facts" (R. 3741, 3774-3775).

It is thus clear that the Commission undertook to fix an over-all value for the Debtor's properties, and that in fixing such over-all valuation the Commission gave greatest weight to earning power, including "traffic and earnings to the latest available date" and "also *future prospects* of traffic and earnings."[6]

Since, therefore, in arriving at the $75,000,000 valuation the Commission took into account the prospective large earnings resulting from the war (*i.e.*, the very earnings which Petitioners now offer as a basis for suggesting that the Commission might change its mind if it were required to

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[6] The District Court, following the *Western Pacific* and *Milwaukee* cases, properly held that the Commission was not required to spell out in detail the precise method by which it arrived at the $75,000,000 valuation (R. 5206).

consider the matter again), Petitioners may not properly compare Debtor's current balance sheet with the balance sheet for August 31, 1941, or for any earlier date, and assume that any intervening increment in assets represents an increase in the valuation of the properties *over and above that fixed by the Commission.* To state it differently, the changes in net current assets or other assets since the date of the Commission's Supplemental Report may not represent an *increase* in the over-all value as found by the Commission, but merely a *realization* of the total value which the Commission reached on the basis of "future prospects of traffic and earnings" (R. 3741).

Impliedly recognizing this weakness in their argument, Petitioners seek to escape it by suggesting that, whereas in the *Denver* case the plan was not formulated by the Commission until June, 1943, in the case at bar the Commission's "last look" at the situation was in March, 1942, over a year earlier. This discrepancy in time would seem to be of little consequence. In the case at bar the European war had been under way for *nearly two years* at the time of the initial Report of June 30, 1941, and its effect was being sharply reflected in all railroad earnings. The Commission itself pointed out in said Report (R. 3691) that Debtor's earnings for the first four months of 1941 indicated that its income available for fixed charges for that entire year would be "substantially in excess of the Trustee's forecast of $4,142,000." At the time of the Supplemental Report of March 9, 1942, the United States had been at war for several months; and the Commission was fully aware that in 1941 Debtor had earnings available for fixed charges of $7,495,940.40, a figure which was substantially in excess of earnings for any year in Debtor's prior history (R. 2683, 5205) and not greatly less than Debtor's earnings for 1942,

1943, and 1944. Debtor's income available for fixed charges in 1941 was in excess of the comparable figure for 1945 (R. 5727), and, on the basis of income available for fixed charges of $6,803,389 for the first 11 months of 1946 (Trustee's Monthly Report dated January 13, 1947, filed in the District Court), was almost exactly identical with its probable earnings for 1946. Necessarily, therefore, this Court must assume that the Commission's valuation would have been *substantially less than $75,000,000* had it not been for the weight which the Commission said it gave to "prospective" earnings.

Obviously, therefore, the "solvency" of Debtor cannot be tested by adding to said sum of $75,000,000 the amount of the increase in Debtor's assets since the Commission's formulation of the Plan.

5. There is no conflict of decisions.

The Petitioner Southern Pacific Company asserts (No. 879, pp. 41-43) that the decision of the court below is in conflict with the recent decision of the District Court for the Northern District of Illinois in the *Rock Island* case, now pending on appeal, in which Judge Igoe refused to *confirm* the plan because of radical changes in the debtor's earnings and assets subsequent to the Commission's formulation of the plan (see, Appendix E, No. 879). In the *Rock Island* case, however, the plan had been voted on and was up before the District Court for *confirmation;* and the basic question before the District Court, as in the *Denver* case (66 S. Ct. 1282), was whether the refusal of certain classes of creditors to approve the Plan was "reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts." As pointed out above (pp. 9-11, *supra*), that stage has not been reached in the case at bar.

Moreover, apart from the fact, there is no conflict. Both decisions recognize the power of a court, under proper circumstances, to remand the Plan because of "changed conditions".

The Debtor asserts (No. 936, pp. 43-48) a conflict with the decision of the Second Circuit in the so-called *Equitable Building* case,—*Adelaide H. Knight et al.* v. *Wertheim & Co., et al.,* decided December 31, 1946 (see, Appendix D, No. 936). In that case, a proceeding under Chapter X of the Bankruptcy Act, the Circuit Court of Appeals held that the District Court had abused its discretion in refusing, prior to final consummation of the plan, to submit to the shareholders an offer to purchase the new company's shares at a price which, together with the bankrupt's liquid assets, *would have permitted paying off the creditors in full, both principal and interest.* In holding that the District Court had abused its discretion, the Court said, in effect, that "If the legally protected interests of any opposing parties are fully preserved," there is no "good reason to deny others any reasonable chance to protect their own interests * * *." The situation in the *Equitable* case is wholly unlike that in the case at bar, since here Petitioners do not even suggest that if the Plan is remanded to the Commission, the creditors will be paid off in full, both principal and interest.

PART II.

The special contentions of petitioner Walter E. Meyer (No. 909).

1. The Circuit Court of Appeals fully performed the required judicial review and correctly held that there was substantial evidence to sustain the Commission's finding, affirmed by the District Court, that the Debtor's earning power has not been impaired by breaches of fiduciary and other obligations by Southern Pacific and others.

Mr. Meyer's chief contention is that the Commission's findings as to valuation and capitalization were predicated upon an erroneous conception of Debtor's real earning power because it did not take into account various alleged breaches of fiduciary and other obligations by Southern Pacific which are said to have impaired Debtor's earnings and assets (No. 909, pp. 2, 19, 26). Thus, he alleges that after Southern Pacific acquired control of Debtor in April, 1932, it failed to obtain for Debtor large amounts of traffic which it should have obtained (No. 909, pp. 7-8); that it failed to carry out the Turney-Saunders agreement to solicit traffic preferentially for Debtor (No. 909, p. 8); and that it caused Debtor to solicit traffic contrary to its best interests (No. 909, pp. 8-9). He further contends that prior to Southern Pacific's acquiring control in 1932, Debtor had been under the illegal control of various competitive railroads, including Southern Pacific, as the result of which its assets had been wasted and earnings impaired (No. 909, pp. 3-6). He also contends that Southern Pacific's claim as a creditor and stockholder should be expunged, or at least subordinated, not only because of the matters above alleged, but because Southern Pacific prevented Debtor from enforcing causes of action under the anti-trust laws

against Kansas City Southern and others (No. 909, pp. 2, 26, 34-36). Finally he asserts that the Plan was formulated on inadequate data, that he was not afforded an adequate opportunity to present evidence of his charges, and that the Commission failed to make an independent investigation of his charges (No. 909, pp. 37-42).

A large amount of evidence purporting to sustain these charges was introduced by Mr. Meyer at the initial Commission hearings in March and April, 1937 (R. 168-212). Thereafter said charges were the subject of further hearings before the Commission, held solely for the purpose, from May 5 to May 27, and from September 18 to September 30, 1939, at which a vast amount of evidence, including hundreds of exhibits, was introduced (R. 529-3055). This evidence was exhaustively considered by the Commission in its initial Report, wherein (after discussing in detail *every allegation by Mr. Meyer*) it concluded that none of the charges was well-founded (R. 3547-3678).

After the Commission issued its initial Report of June 30, 1941, Mr. Meyer filed numerous objections thereto. The Commission carefully considered these objections in its Supplemental Report of March 9, 1942, and concluded that none of them was well-founded; and it reaffirmed its original determinations with respect to the Meyer charges (R. 3742-3752).

Thereafter, at the hearing before the District Court upon objections to the Plan, Mr. Meyer reiterated his charges against Southern Pacific, and introduced a large amount of additional evidence with respect thereto (R. 4157-4199, 4202-4209, 4304-5166).

Mr. Meyer asserts (No. 909, pp. 3, 19, 31-32) that the District Court did not review the Commission's findings and that the Circuit Court of Appeals did not make an

"adequate review." The record shows clearly, however, that the District Court carefully considered Mr. Meyer's charges specifically and in detail (R. 5197-5203) in its opinion of February 9, 1944, and concluded (R. 5202) that Mr. Meyer "has not convinced either this Court or the Commission that his charges are well-founded."[7] It further found (R. 5202):

> "* * * that ample opportunity has been afforded to Mr. Meyer by the Commission and by the Court to present evidence in support of his various allegations and objections, and that the time elapsed during the pendency of these proceedings has afforded ample time for him to fully prepare his case."

With respect to Mr. Meyer's contention that Southern Pacific's creditor claim should be expunged or subordinated, the District Court pointed out the additional facts that certain parties, but not Meyer, filed objections in the District Court to Southern Pacific's claim; that extended hearings on such objections were held before a Special Master who found in favor of Southern Pacific; that exceptions were taken to the Master's report which were overruled and the claim allowed; and that in view of Meyer's failure to avail himself of the chance to object to Southern Pacific's claim he may not be heard to make any objection (R. 5199).

Upon appeal the Circuit Court of Appeals dealt exhaustively and painstakingly with each of Mr. Meyer's charges, devoting 88 out of 117 pages of its opinion to these matters (R. 5564-5652).

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[7] As to the charge of derelictions by Southern Pacific prior to April, 1932, see R. 3637; as to alleged derelictions after April, 1932, including the alleged failure to carry out the Turney-Saunders agreement, see R. 3669-3670; as to the charge that Southern Pacific prevented the Debtor from asserting causes of action for violation of the anti-trust laws, see R. 3678; as to the charge that Mr. Meyer's contentions were not adequately investigated, see R. 3549-3676.

A review of the voluminous record shows, we submit, that rarely before have so many charges received such prolonged and careful attention by so many administrators and judges.

As stated by the District Court (R. 5203), the issues raised by Mr. Meyer "are matters requiring study by experts on railroad affairs, involving, as they do, expert analysis of traffic movements, freight loadings, financial statements and other data peculiarly within the comprehension of the I. C. C." In view of the finality which attaches to the Commission's findings of fact, and particularly findings as to valuation, capitalization and all other matters affecting the public interest, we submit that the affirmation of the Commission's emphatic rejection of Mr. Meyer's charges by both courts below is conclusive upon this Court. See, *U. S.* v. *Commercial Credit Co., Inc.*, 286 U. S. 63, 67 (1932); *Texas & N. O. Railroad Co.* v. *Ry. Clerks*, 281 U. S. 548, 558 (1930).

2. The Circuit Court of Appeals correctly held that the procedure followed by District Judge Moore upon the death of District Judge Davis did not constitute an abuse of discretion.

Mr. Meyer's contention that he was entitled to a "new trial" upon the death of Judge Davis is wholly ill-founded.

After the Commission certified the Plan to the District Court, hearings were held on objections thereto before the late Judge Davis (R. 4051 *et seq.*). At these hearings additional evidence was introduced, the bulk of which was presented by Mr. Meyer (R. 4157-4199, 4304-5136). During the hearings all parties presented their respective arguments except Debtor and Mr. Meyer, whose arguments were set down for hearing on December 18, 1943 (R. 4991). Before these arguments were had and briefs filed, Judge Davis

died. Thereafter the parties appeared before Judge Moore, to whom the case was assigned, to discuss the procedure to be followed. After an extended discussion (R. 5138-5180), Judge Moore entered an order, dated April 23, 1943, that the record on the Plan as certified by the Commission and the record theretofore made before the late Judge Davis be taken as submitted, that the Plan and the objections thereto and claims for equitable treatment be set down for oral argument on May 31, 1943, and that during or at the conclusion of said oral argument the Court *would entertain any motion respecting the taking of additional testimony or otherwise pertaining to the completion of the record on the Plan* (R. 5182). The District Court reserved the right to amend or modify the order in any manner consistent with Section 77 (R. 5183). On May 31, 1943, the parties appeared by counsel before Judge Moore and submitted their respective oral arguments. *Neither Mr. Meyer nor any other party made any request for leave to present additional evidence.*

Mr. Meyer contends (No. 909, pp. 47-50) that upon the death of Judge Davis he was entitled to a complete hearing *de novo*. The Circuit Court of Appeals held that the granting of a hearing *de novo* was a matter within the discretion of the District Court and that that court did not abuse its discretion in following the procedure above outlined (R. 5567-5569).

Whatever may be the applicable rule with respect to ordinary jury or non-jury trials, these respondents submit that none of the parties was entitled, as of right, to a hearing entirely *de novo* after the death of Judge Davis. Under the special statutory reorganization scheme of Section 77, by which the functions of the Commission and the District

Court are "brigaded,"[8] the great bulk of the evidence, of necessity, is presented in the first instance to the Commission; and this evidence necessarily comes before the District Court in the form of a written transcript. If the District Judge does not approve the plan, he is directed to remand the same to the Commission and to "transmit to the Commission *a copy of any evidence received*" (11 U. S. C. A., §205(3)). To contend that it is proper for a District Court to review and pass upon evidence received by the Commission (or for the Commission to consider evidence introduced before the District Court) but that it is improper for a District Judge to review and pass upon purely supplementary evidence introduced before a predecessor judge who died before he could review his decision is absurd,—especially in view of Petitioners' assumption that *this Court* may and should consider all kinds of unverified documentary and other data bearing on Debtor's earnings and assets since the record was closed in the District Court! As a matter of fact, although most District Courts in Section 77 proceedings have made it a practice to receive additional evidence on the hearing upon objections to the plan, there is nothing in the statute which requires that such additional evidence be received and it would appear to be entirely a matter of discretion whether the District Court shall receive such additional evidence.[9]

Moreover, whatever may have been Mr. Meyer's technical right to a rehearing *de novo*, such right was clearly waived by him. Although Mr. Meyer and his associate, Mr.

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[8] *Palmer* v. *Massachuetts*, 308 U. S. 79, 87 (1940).

[9] The courts have recognized that rules of procedure applicable to ordinary jury or non-jury trials upon the death or retirement of the judge do not apply in special statutory proceedings which may be drawn out over many years. See, *In re Nolan's Will*, 63 Atl. 618 (N. J., 1906); *Barton* v. *Burbank*, 138 La. 997, 71 So. 134 (1916); *Matter of Carey*, 24 App. Div. 531 (4th Dept., 1897).

Chubb, made statements at the conference before Judge Moore in April, 1943, which indicated that they believed that they were entitled to a hearing *de novo,* Mr. Meyer clearly indicated that he had no real objection to Judge Moore considering the evidence which had been presented before Judge Davis and that what he really wanted was an opportunity to present *additional evidence;* and the chief question discussed was whether Mr. Meyer had a legal right to present additional evidence.

Thus, Mr. Meyer stated (R. 5155):

> "• • • all I want is an opportunity to introduce this new testimony, an opportunity, if I may use the word, to educate Your Honor as to the facts of this extraordinary case. And I am not here for any other purpose."

Finally, at the very end of the hearing, Mr. Chubb stated specifically (R. 5180):

> "• • • Mr. Meyer has said and I have said that *it is our present intention to take no exception to the use of such testimony as has already been taken.* • • •"

Moreover, neither in his elaborate brief of 242 pages before the District Court dated July 2, 1943, nor in his reply brief of 109 pages dated August 4, 1943, did Mr. Meyer make any contention that the District Court was precluded from considering the evidence which had been introduced before Judge Davis or that by reason of Judge Davis' death he was entitled to a hearing *de novo.* As a matter of fact, many of the contentions in Mr. Meyer's briefs were in whole or in part predicated upon the testimony presented before Judge Davis.

Having thus led the parties and the District Court to believe that he had no objection to Judge Moore considering

the evidence which had been introduced before Judge Davis, obviously Mr. Meyer cannot now be heard to complain that Judge Moore did consider that evidence; and having thereafter failed, at the hearing before Judge Moore on May 31, 1943, to request permission to present additional evidence, pursuant to Judge Moore's order of April 23, 1943 (R. 5182), he cannot now be heard to complain on that score.

3. The Circuit Court of Appeals correctly denied Mr. Meyer's motion to remand.

While the appeals were pending in the court below, the Petitioner Meyer moved to remand the proceedings to the Commission on the ground of newly-discovered evidence, alleged to have been revealed in the complaint in an anti-trust action brought by the United States against the Association of American Railroads and others in August, 1944, in the District Court for the District of Nebraska, and in the so-called "Western Agreement" annexed to said complaint. The court below denied the motion on the ground that Mr. Meyer had been familiar with the Western Agreement for many years and hence that it did not constitute newly-discovered evidence (R. 5571-5573).

Mr. Meyer's attempt to bring this issue before this Court must fail, first, because the denial of a motion for a new trial on the ground of newly-discovered evidence is not reviewable except for manifest abuse of discretion.

> *Royal Ins. Co.* v. *Eastham*, 71 F. (2d) 385 (C. C. A. 5th, 1934), c. d. 293 U. S. 557 (1935);
> *McIntyre* v. *Texas Co.*, 48 F. (2d) 211, 212 (C. C. A. 2d, 1931).

Moreover, the action of the Circuit Court of Appeals was plainly correct. A new trial will not be granted on the ground of newly-discovered evidence unless the moving

party clearly establishes (1) that he did not discover, and by the exercise of reasonable diligence could not discover, the evidence until after the original hearing, and (2) that the evidence is not merely cumulative, but possesses such weight as to indicate that a rehearing would probably produce a different result. *Crow* v. *Dumke*, 142 F. (2d) 635 (C. C. A. 10th, 1944). Mr. Meyer's petition utterly fails to show how the alleged newly-discovered evidence might have affected the Commission's findings. Moreover, the record shows that at least as early as December 22, 1932, Mr. Meyer was familiar with the so-called Western Agreement (Exhibit 225, before the Commission). As a matter of fact, the Western Agreement was more or less public knowledge long before the Debtor's bankruptcy (see testimony of Joseph B. Eastman, Hearings before the Senate Committee on Interstate Commerce on S. 942, 78th Cong., 1st Sess., pp. 831-832, 834).

Conclusion.

The petitions raise no questions of general importance. There is no conflict of decisions and the decision is clearly correct. The petitions should be denied.

Respectfully submitted,

February 22, 1947.

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